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No. 07-1216

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The question presented should be stated as:

Whether, after this Court remanded a case with instructions to apply a new standard to be invoked "upon request," a state court may consider state law grounds previously asserted and briefed to decide whether such a proper request was made.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case involves a massive market-directed fraud driven by high-level decisions to deceive customers and knowingly endanger their health in order to generate enormous profits. It constituted one of the longest running, most profitable, and deadliest frauds in the annals of American commerce. Jesse Williams became highly addicted to cigarettes, smoking three packs a day of Philip Morris's "Marlboro" brand, using industry denials, as Philip Morris intended, to rationalize his continued smoking. He died of lung cancer in 1997. Philip Morris, Appendix to the Petition for a Writ of Certiorari, No. 07-1216, 4a-5a (Mar. 24, 2008) (hereinafter "Pet. App.")

For at least 40 years, Philip Morris knew that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. App. 4a-5a. In an effort to maximize profit, Philip Morris either publicly denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health. Pet. App. 30a-35a. On March 30, 1999, a Multnomah County, Oregon jury found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury also found Philip Morris liable for misrepresentation. It awarded $21,485.80 in economic and $800,000.00 in non-economic

damages for each claim.[1] The jury declined to award punitive damages on the negligence count. With regard to the misrepresentation claim, the jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." Joint Appendix, No. 07-1216, J.A. 45a. (Aug. 13, 2008) (hereinafter "J.A."). The jury then awarded $79.5 million in punitive damages in connection with the misrepresentation claim. *Id*. at 46a.

After engaging in a searching review of the record pursuant to this Court's instructions in *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and after remand from this Court in light of *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court in 2006 found Philip Morris's misconduct in this matter to constitute "extreme and outrageous circumstances" and to be "extraordinarily reprehensible, by any measure of which we are aware." Pet. App. 66a. It was only shortly after the March 30, 1999 verdict in this case that Philip Morris publicly admitted that nicotine was addictive and smoking caused lung cancer and other diseases. *See* Barry Meier, "Philip Morris Admits Evidence Shows Smoking Causes Cancer," N.Y. TIMES, Oct. 13, 1999 (available at

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[1] A statutory cap on noneconomic damages reduced the jury's $800,000 verdict to $500,000. Pet. at 2a, citing ORS § 18.560(1).

http://query.nytimes.com/gst/fullpage.html?res=9404E1D91530F930A25753C1A96F958260).

Yet today, some nine years after trial, Philip Morris asks this Court to order an entirely new trial to redetermine whether it is liable even for compensatory damages on the theory that no one can accurately determine what aspect of its misconduct generated the jury's 1999 punitive verdict. Philip Morris, Petitioner's Brief, No. 07-1216, 42-48 (Aug. 13, 2008) (hereinafter "Br."). At the same time, Philip Morris accuses the Oregon Supreme Court of erecting a pretextual barrier to any relief because it invoked a firmly established and regularly followed state rule, which the company asserts was somehow waived—not by Mrs. Williams, but by the Oregon courts themselves.

Both of the Oregon Supreme Court's decisions in this case have been on remand from this Court. After the Oregon Court of Appeals heard the first appeal from the trial court, the state's high court declined discretionary review. *Williams v. Philip Morris, Inc.,* 61 P.3d 938 (Or. 2002). This Court subsequently issued a GVR order in light of its new decision in *State Farm. Philip Morris USA Inc. v. Williams,* 540 U.S. 801 (2003) ("*Williams I*"). The Oregon Court of Appeals and the Oregon Supreme Court then reviewed the case under the federal standards set forth in that case. Neither court addressed the full array of Mrs. Williams' state-law arguments, addressing instead federal issues because the case was remanded on that basis. Philip Morris also assigned the federal issues as error requiring review. After these courts determined that *State Farm* did

not change the result, there was no reason for them to consider Mrs. Williams' state-law objections.

This Court subsequently granted certiorari. After briefing and oral argument, it reversed and remanded. *Philip Morris USA v. Williams,* 127 S.Ct. 1057 (2007) ("*Williams II*"). In that decision, this Court endorsed the propriety of the Oregon Supreme Court's prior ruling that a "'jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.'" *Id*. at 1064, quoting Pet. App. 48a. It further held that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id*. Thus, a jury may properly punish the misconduct to reflect the degree of its reprehensibility.

This Court, however, determined that a jury may not go further and directly "punish for harm caused strangers," *Id*. at 1064, because there is "no opportunity to defend against the charge, by showing, . . . that the other victim was not entitled to damages." *Id*. at 1063. It stated that, in "appropriate cases" "upon request," *id*. at 1065, there must be some protection against juries answering the "wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id*. at 1064. This Court also found the grounds upon which the Oregon court rejected Philip Morris's Requested Instruction No. 34 to be unclear: although "one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility," "we believe that the Oregon

Supreme Court applied the wrong constitutional standard." *Id.* at 1064, 1065. That belief was based on a footnote in the Oregon court's opinion that opined, "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus," and "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 1064-65, quoting Pet. App. 49a n.3.

The case was remanded again to the Oregon Supreme Court to "apply the [new] standard." *Id.* at 1065. That standard requires that where the risk of a jury misunderstanding the legitimate role of evidence concerning harm to others is "significant," the trial court "upon request, must protect against that risk." *Id.* The Court, in announcing the standard, indicated that states retain flexibility to decide what kind of process to afford but insisted that states must provide "*some* form of protection in appropriate cases." *Id.*

Upon remand, the Oregon Supreme Court meticulously reviewed this Court's decision and faithfully followed it. *See* Pet. App. 3a, 7a-12a. It recognized that *Williams II* required some protection against jury confusion "upon request," and it considered that requirement first, (Pet. App. 13a n.4), including objections to Philip Morris's requested instruction repeatedly raised by Mrs. Williams. *See* Pet. App. 9a n.2, some of which had been ruled upon by the trial court in Respondent's favor in 1999. The court found that Philip Morris's lengthy instruction misstated Oregon law in several respects, and thus it was not error for the trial court to refuse to give it as proffered.

SUMMARY OF ARGUMENT

For nearly a century, Oregon has required litigants to propose jury instructions that are "clear and correct in all respects." Those who practice law in the Oregon courts are well aware of this principle of party presentation and, accordingly, know that they must separate complex instructions into separate instructional requests with just one main point of law in each instruction. Philip Morris did not do that. Instead, it proffered a single, three-and-a-half page amalgam covering more than 11 different legal points, some contradicting each other and others misstating Oregon law in several important respects. On the "harm to others" question, Philip Morris accepted the trial court's proposed solution and chose not to submit a new instruction focused on the issue.

Philip Morris defends its decision to rely on a patently defective instruction by claiming that the submitted instruction was still sufficient to preserve the error for appeal. In making that argument, Philip Morris misapprehends the import of the "correct in all respects" rule. Under Oregon law, the mere request for an instruction is sufficient to *preserve error* when that request is denied. However, it is *not error* for the trial court to refuse the instruction unless it is correct in all respects. Oregon's courts have uniformly held that there is no error in refusing the requested instruction if it is not "clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus,* 536 P.2d 1251, 1256 (Or. 1975). Before this Court, Philip Morris treats the issue of *preservation of error,* to which they devote

much of their argument, as if it trumps the longstanding "correct in all respects" requirement. That is wrong. Plainly, the error preservation alone does not guarantee reversal. The appellate court must still separately decide whether the trial court erred.

In *Williams II*, this Court said that, in cases involving punitive damages and harm to non-parties, "where the risk of [a jury] misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, *upon request,* must protect against that risk." *Id*. at 1065 (emphasis added). Responding to that holding the Oregon Supreme Court on remand concluded that it was required to determine whether a proper request was made under Oregon law, because this Court made a "request" a part of the constitutional standard it announced. As Philip Morris now acknowledges, Mrs. Williams repeatedly raised state-law objections based on the "correct in all respects" rule throughout this litigation. Because it had not yet ruled on those arguments, the Oregon Supreme Court reviewed those issues in its most recent opinion to determine whether the trial court committed error in refusing to give Philip Morris's requested instruction.

The court held that Philip Morris did not request an instruction that was correct in all respects. Agreeing with the trial judge that the requested instruction conflicted with the Oregon statute that specifies the criteria for punitive damages, the Court found that the trial judge did not err in rejecting the instruction as proffered. Before this Court, Philip

Morris does not argue that its requested instruction was in fact correct in all respects. Instead, it argues that the trial judge engaged the issue, and thereby preserved it, by ruling against Philip Morris "on the merits." The judge, however, did not rule against Philip Morris on the constitutional issue. She in fact agreed with Philip Morris and said "we are not here to punish for other plaintiffs' harms." The judge suggested language that Philip Morris accepted that addressed its concern. Philip Morris gave the judge no reason to believe that the issue had not been satisfactorily resolved. It also did not draft a new instructional request to reflect its preferred language, even after closing argument, as it certainly could have. It merely took exception, after the jury was instructed, to the failure to give its request No. 34 *as a whole*.

The judge's review of the details of the requested instruction also does not void the "correct in all respects" rule, as Philip Morris now contends. As a practical matter, a charge conference will always go through each party's objections to specific language in any instruction. There is no other way to examine an instruction. It is only on appeal that the "correct in all respects" rule has impact. An appellate court cannot revise an instruction. Instead, it is limited to determining whether the requested instruction was erroneously rejected because it was "correct in all respects." As such, Philip Morris mistakenly treats the rule as a matter of trial procedure, when it is a rule of appellate review.

Despite its protestations about lacking notice of the "correct in all respects" rule, a wealth of precedent supports the rule in precisely the manner in which it was applied in this case. Moreover, Philip

Morris has demonstrated in Oregon and elsewhere that it fully understands how to draft a proper instructional request. In a 2002 Oregon trial, well before what it portrays to this Court as the "novel" 2008 holding by Oregon Supreme Court in this case, Philip Morris requested a series of single-sentence jury instructions that included one on harm to non-parties. In that case, the request was denied by the trial court. The Oregon Court of Appeals disagreed with that ruling. It found it was a proper request, and more importantly, an accurate reflection of the law. The court reversed the judgment against Philip Morris, in part, due to denial of that proffered jury instruction on "harm to others." *Estate of Schwarz v. Philip Morris, Inc.,* 135 P.3d 409, 429 (Or. Ct. App. 2006). Plainly, Philip Morris and its counsel know how to comply with this outcome-neutral requirement.

Philip Morris attempts to excuse its failure to comply with this venerable rule by variously claiming that the Oregon Supreme Court implicitly ruled in Philip Morris's favor on the state-law issues by not ruling on Mrs. Williams' objections when the case was before that court in 2006; that the court waived Mrs. Williams' state-law objections by reaching them only after this Court resolved the federal issues and remanded the case; that the court ruled in a manner that is contrary to other (inapposite) Oregon precedent; or that the Court applied the "correct in all respects" rule in a manner that is unique and unprecedented. Philip Morris also makes the additional claim that this Court's previous review of the federal legal issue necessarily resolved the state-law issues *sub silento* as well. None of these claims survives scrutiny.

Not only are these claims at odds with the position Philip Morris took in oral argument before the Oregon Supreme Court and before this Court, many of them depend on a theory of implicit judicial waiver of an individual's rights, even when that individual has done everything required to preserve those issues. To deny Mrs. Williams a meaningful hearing on these state-law objections would have violated the most elemental form of fundamental fairness that is at the core of the Due Process guarantee.

The "correct in all respects" rule serves legitimate state interests. It reflects the principle of party presentation, which places the onus on the litigants to assure that the jury is correctly instructed. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008). As a result, the trial judge has no obligation to edit, draft, or reform an erroneous instruction requested by a party. In addition, the "correct in all respects" rule serves sound principles of judicial administration by minimizing costly retrials, helping achieve finality in judgments, facilitating the administration of claims, and promoting judicial efficiency.

This Court should reject Philip Morris's ill-conceived bid to make it appear that the Oregon Supreme Court acted in defiance of this Court's earlier decision in this case. Nothing in this Court's decision in *Williams II* or in the Oregon courts previous reviews of this matter warrants the blanket disregard that Philip Morris demonstrated for Oregon's firmly established and regularly followed rule that an appellate court will find no error in a trial court's refusal to give a jury instruction that is not clear and correct in all respects as proffered.

That ruling provides an adequate and independent state-law ground for the disposition of this case. Twelve years after the tragic death that gave rise to this action and nine years after the lengthy trial of this case, with four appellate reviews in Oregon, and five years after the first of three trips to this Court, it is time for this litigation marathon to end. This Court should either dismiss the Petition for want of jurisdiction or affirm the decision of the Oregon Supreme Court.

ARGUMENT

I. PHILIP MORRIS FAILED TO FOLLOW LONGSTANDING AND REGULARLY APPLIED OREGON RULES GOVERNING PROPOSED JURY INSTRUCTIONS

The Oregon Supreme Court held that there was no reversible error in the trial court's failure to give Philip Morris's requested instruction No. 34 because it was not clear and correct in all respects. Pet. App. 21a. For 92 years, under Oregon law, "an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau*, 536 P.2d at 1256. The rule "require[s] that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give." Pet. App. 14a. As such, it is a feature of our adversary system's principle of party presentation. *See Greenlaw*, 128 S.Ct. at 2564. (discussing party presentation principle).

Yet Philip Morris assumes no responsibility for the fact that its proposed jury instruction was erroneous in at least some respects, or for its failure to take any steps to cure these errors by proposing a revised instruction, which it had ample opportunity to do. *See Baker v. Infratech Corp.*, 26 P.3d 835, 842 (Or. Ct. App. 2001) ("If a party wishes to rely on the failure to give a requested instruction at trial as error on appeal, it must formulate a *correct* instruction and request that the trial court give it.") (emphasis added). Yet, Philip Morris never submitted a second proposed instruction accounting

for state-law defects identified by the trial judge in its only submission on punitive damages..

Philip Morris attempts to excuse its neglect by treating the "correct in all respects" rule as merely an error-preservation requirement and not, as it is, a substantive rule of appellate review. Philip Morris erroneously asserts that this Court found that it made "clear at the charge conference its position on the federal issue." Br. 12. For that reason, a review of the record is necessary.

A. PHILIP MORRIS DISTORTS WHAT HAPPENED AT TRIAL AND IN THE SUBSEQUENT APPEALS

Philip Morris significantly mischaracterizes its position before the trial court and the holdings below in an effort to excuse its failure to comply with a longstanding Oregon rule and falsely claim that any attempt to follow standard state practice would have been futile. The record, however, supports the Oregon Supreme Court's review of the state-law issues on remand, issues it resolved in a manner consistent with *Williams II*.

1. The Trial Judge Did Not Rule that a "Harm to Non-Parties" Instruction Was Not Constitutionally Required, But Considered the Issue Settled by Alternate Language that Philip Morris Endorsed

Philip Morris tells this Court eight times that the trial court ruled against its requested "harm to others" language on the merits. Br. 4, 10, 13, 28, 29,

30, 31, & 33. Instead, the charge conference transcript reveals that Philip Morris expressed satisfaction with the trial judge's resolution of the issue.[2] The judge clearly believed that the concern articulated by Philip Morris was fully addressed, so that there was no need to rule on any constitutional issue:

> In terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first —we have already told the jury that punitive damages are not compensatory damages. I would maybe say — . . . They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff.

J.A. 19a.

Philip Morris responded to this statement by recognizing that the judge's language conformed to the state statute, which declared the purpose of punitive damages to be punishment and deterrence,

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[2] In addition, Philip Morris's requested Instruction No. 34 presented the judge with alternative paragraphs denominated as "1," indicating that either one satisfied their concern. While the first version contained the language reviewed by this Court in *Williams II,* the second version re-expressed the concern as one relating only to "the impact of its conduct on individuals in other states." J.A. 32a. Both expressed concerns were covered by the instruction actually given. J.A. 36a-37a.

but then suggested without citing any authority, "I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there." J.A. 20a. The judge, however, found the "harm to others" element accounted for:

> the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one—if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," if that gets you where you need to be.

Id. Defense counsel responded, "Okay." *Id*. To be sure that Philip Morris was satisfied with this language, the judge then asked whether "plaintiff or anyone else" was preferable to "plaintiff" alone." *Id*. Philip Morris replied, "I would go with the phrase 'or anyone else.'" *Id*. This led the judge to conclude Philip Morris's concern had been addressed: "I think I have satisfactorily worked my way through your Element No. 1." *Id*. Philip Morris voiced no disagreement. Later, the court reaffirmed, "You won the point that punitive damages have to arise from the defendant's conduct which is causally connected to the claim for relief, and that's covered."[3] J.A. 25a; *see also id*. at 28a ("COURT: Well, I would modify even yours, Mr. Beattie, to say, in quotes, 'In

[3] Earlier in the charge conference, the trial judge agreed with Philip Morris that "we are not here to punish for other plaintiffs' harms … We are here to punish—if we are here at all to punish, . . . for the conduct that caused harm to Jesse Williams." J.A. 12a.

engaging in conduct which was a cause of damage to Plaintiff,' . . . to be consistent.").

There simply was no trial-level ruling rejecting the Philip Morris position on "harm to others" because the court believed it had satisfactorily addressed the issue. Philip Morris gave the trial judge no reason to believe otherwise.

Philip Morris also claims that the Oregon Supreme Court "recognized" that the trial court "had denied Philip Morris's federal claim on the merits." Br. 10. The supreme court never said that. Instead, the court specifically rejected Philip Morris's claim that submitting a properly worded instruction would have been "futile," given how "soliticitous" the trial judge was. Pet. App. 16a n.5.

The record demonstrates that the trial court rejected Philip Morris's No. 34 as a whole on the basis of multiple valid independent state-law grounds: parts of it were covered by other instructions, J.A. 23a ("the point is adequately conveyed. There is nothing new in lines 13 through 19"); parts were argumentative comments on the evidence, J.A. 21a ("Your Paragraph 1 on Page 2 is closing argument"), J.A. 25a ("I don't see anything on Page 3 or 4 that isn't argumentative-counsel material, commentary on the evidence by the Court"); and parts misstated applicable state law. *Id.* ("I'm not telling the jury that it is an illicit profit. That's not part of the statute.").

At the same time, the trial judge invited Philip Morris to submit a new draft instruction on an issue not yet adequately covered. J.A. 22a. Clearly, Philip Morris had ample opportunity to comply with state-

law requirements and submit an instruction relating to harm to others. Instead, Philip Morris expressed satisfaction with the resolution of this issue and only after the jury was instructed took exception for failure to give its instruction No. 34 *as a whole*. J.A. 38a. It never specified what part of No. 34 was at issue and never disputed the validity of the judge's other rulings on the instruction, any one of which was sufficient to deny the request under Oregon law. *See Owings v. Rose,* 497 P.2d 1183, 1188 (Or. 1972) (citations omitted) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors"). Thus, even if Philip Morris had preserved its objection to the failure to give its instruction as submitted, the trial court is properly affirmed unless the instruction was correct in all respects.

2. Philip Morris's Misreading the Record Arises from Its Shift of Position on Appeal

Philip Morris did not assign error to the trial court's failure to use its "harm to others" language. In its first appeal, it instead said the trial judge should have instructed the jury "that its award should bear a reasonable relationship to the harm caused to Williams." Pet. App. 140a-141a. It was in response to a claim that the jury must be told "about proportionality" even if the issue is normally handled "post-verdict," that the judge asked, "why wander where no judge has been told to go before?" J.A. 16a, 17a. After this Court's *State Farm* remand, Philip Morris began shifting its argument from "reasonable relationship" to "harm to others." However, it continued to rely on the trial court's rejection of the

"reasonable relationship" language through oral argument in the Oregon Supreme Court. App. 11a-15a.[4] That is the source of its incorrect contention that the trial court refused to instruct on "harm to others." The trial court's refusal concerned a distinct and separate topic.

3. Philip Morris Conceded that the State Law Issues Were Unresolved and Ripe for Decision by the Oregon Supreme Court

Before this Court this time, Philip Morris makes strenuous protestations that the state-law flaws in their request for an instruction were implicitly resolved, either by the Oregon Supreme Court during earlier reviews, Br. 25 ("they rejected that claim on the merits"), or by this Court, Br. 19, 21 ("the majority implicitly rejected that forfeiture argument"). Thus, they contend that the Oregon Supreme Court's 2008 decision considering those flaws "appears to be nothing more than a pretext for refusal to protect Philip Morris's due process rights" and "effectively re-examine[s] the underpinnings of this Court's decision—and exceed[s] its authority." Br. 2, 21.

In both arguments before the Oregon Supreme Court, however, Philip Morris sang a different tune. After the first remand, Justice Durham asked, "Is it your position that the remand for reconsideration in light of *State Farm* alters or relieves any preservation requirements that Oregon law might

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[4] Associated Oregon Industries *et al.* makes the same mistake in its current briefing. Amicus Br. of Assoc. Ore. Indus. at 8.

apply?" Philip Morris's counsel answered, "No, it does not relieve. No, it does not. The same preservation rules require an issue that is not adequately preserved can be rejected by this court and that would be an adequate state ground." App. 3a.

The issue was broached again after the *Williams II* remand. Justice Durham emphasized that "[w]e are just talking about the adequacy of the offered instruction from your client" and not about "charges that Oregon's procedures for the drafting and submission of jury instructions and the approval of jury instructions by the trial court . . . is somehow invalid, are we?" Philip Morris's counsel agreed.[5] When asked, whether Philip Morris "had a full opportunity to submit whatever instructions it wished and to get a legally correct instruction delivered by the trial court," counsel answered, "Yes." App. 4a-5a.

In its most recent argument in this case, confronted with whether state-law objections were sufficient to determine the cause, Philip Morris pinned its argument on a claim that those objections were not properly raised. Justice Durham then asked whether the "principle of correct in all respects is not the law?" Rather than argue, as it does now, that such objections had been overruled or waived, Philip Morris merely challenged whether the "correct in all

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[5] In the oral argument in *Williams II,* Philip Morris counsel similarly agreed with Justice Scalia when the justice said the Oregon Supreme Court could still nonetheless "disallow the instruction for a different reason," if the Court ruled in Philip Morris's favor on the federal issue. App. 1a-2a. ("calling that view "correct").

respects" rule still obtained as a matter of Oregon law: "I don't believe, I believe that that is the law qualified by not only *[State v.] George[,* 97 P.3d 656 (Or. 2004)] but the cases that came before it that talk about the reason for the preservation rule." App. 4a-6a.

Thus, before the Oregon Supreme Court, Philip Morris did not challenge the court's authority to rule on Mrs. Williams' state-law objections; it instead asserted that she had either failed to preserve those objections,[6] something it no longer contends, *see* Br. 25 n.7, 42, or was wrong on the applicable state law. It did not assert that the state-law arguments had been decided by this Court or the Oregon courts, as it does now. Instead, it contended that it had fully complied with state law because it mistakenly believed that *George* retroactively relieved it of its burden under the "correct in all respects" rule. The Oregon Supreme Court, however, decided that Philip Morris was wrong on the merits of the state-law issues. That decision is an adequate and independent ground to reach a final disposition in this case.

B. PROPOSED INSTRUCTION NO. 34 CONTAINED MULTIPLE SUBSTANTIVE AND PROCEDURAL FLAWS

The trial court rejected Philip Morris's four-page amalgam that covered at least eleven different legal issues on multiple grounds. *See* J.A. 21a, 23a, 25a.

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[6] The Oregon Supreme Court noted that Mrs. Williams had argued alternative state-law grounds for rejecting the proposed instruction, but that the court had not previously reach them because it believed its federal ruling was sufficient. Pet. App. 9a n.2.

The Oregon Supreme Court based its most recent decision on one of the legal flaws in the instruction identified by the trial court and another reason argued by Mrs. Williams on appeal. Pet. App. 15a. Philip Morris has not seriously disputed the merits of these holdings, but has instead sought to dismiss them as tangential "trivialities." Philip Morris, Petition for a Writ of Certiorari, No. 07-1216, 25 (Mar. 24, 2008) (hereinafter "Pet.").

Still, it should not go unremarked that Philip Morris is wrong when it insists that this Court found their language "accurately stated due process requirements."[7] Br. 21. As Justice Ginsburg pointed out, this Court "ventured no opinion on the propriety of the charge proposed by Philip Morris" and that a "judge seeking to enlighten rather than confuse surely would resist delivering the requested charge."[8] *Williams II*, 127 S.Ct. at 1069 (Ginsburg, J., dissenting).

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[7] The instruction would have told the jury to consider harm to others on the question of proportionality. In *Williams II,* this Court made it clear that harm to nonparties may be considered by a jury in evaluating the reprehensibility of defendant's misconduct but that the jury may not punish directly for harm that misconduct causes to nonparties. 127 S.Ct. at 1064. Defendant's Request No. 34, however, would have (1) omitted any mention of considering harm to others to determine reprehensibility and (2) told the jury that it could consider harm to others in determining the reasonableness of the relationship — the "ratio" — of punitive to compensatory damages. Either flaw further supports the trial court's refusal to give the jury that instruction as written. Respondent's repeated assertions that subparagraph 1 of its request No. 34 "correctly stated federal law" are false. Br. 7, 12, 14, 21, 27-28, 33, 35, 44.

[8] At oral argument in this Court, Justice Souter also found the language of the proposed instruction bothersome, noted that

1. Petitioner's No. 34 Misstated the Relevance of the Oregon Statutory Factors

The Oregon legislature has mandated that punitive damages, if any, "*shall* be determined and awarded based upon" specific enumerated statutory criteria. ORS § 30.925(2) (emphasis added). The statute is mandatory and exclusive, providing the only criteria on which the determination and award of punitive damages "shall be" based. Philip Morris's No. 34 proposed making that mandatory language permissive by advising that the jury "may find" the factors useful in assessing reprehensibility and leaving the door open to other unspecified factors. Pet. App. at 3a. Even the language at the core of its petition to this Court was qualified as a factor that "you [the jury] may wish to consider," thereby allowing the jury discretion to punish for harm to others. J.A. 31a. To allow the jury such arbitrary leeway to devise their own criteria, as Philip Morris's language would have permitted, would not only have been error under ORS § 30.925, it also implicates this Court's concern with "'arbitrary punishments,' . . . that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Williams II*, 127 S.Ct. at 1062 (quotation omitted). The trial court properly rejected it, and the Oregon Supreme Court properly agreed. Pet. App. 19a.

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it was "probably an unsound request," and said, "I have great difficulty in seeing how I could find that it was error to refuse to give the instruction." App. at 1a. Philip Morris's counsel admitted, "Maybe it could be edited up to be a little sharper." App. at 2a.

2. Petitioner's Request No. 34 Misstated the "Profit" Factor

The Oregon Supreme Court held that Instruction No. 34 was wrong because it would have advised the jury that cigarette sales are legal and that the jury should consider only the defendant's motivation to secure "illicit" profits, misstating the statutory factor, as the trial court also ruled. Pet. App. 20a-21a, J.A. 25a-26a. ORS § 30.925(2)(c) requires that the fact finder base its determination and award of punitive damages on "the profitability of the defendant's misconduct," if any. The statutory factor is "profitability," not "motive to profit" and not "illicit profits." The trial court properly rejected Petitioner's No. 34 for this reason alone. The Oregon Supreme Court properly agreed. Pet. App. 20a-21a.

3. Requested Instruction No. 34 Would Have Tied the Amount of Punitive Damages to the Extent of Public Knowledge about the Risks Associated with Smoking

Philip Morris's proposed instruction was defective in several other respects that the Oregon Supreme Court did not reach, but that Mrs. Williams argued. J.A. 85a. She objected to Requested Instruction No. 34, in part, because it erroneously tied the amount of punitive damages to the extent of public knowledge about the dangers of smoking. In suggesting that the jury limit any punitive damages "to the extent that the risks from smoking were not a matter of general public knowledge," J.A. 31a, Philip Morris sought to introduce an idea that was not only unprecedented and confusing, but wrong in a way that would have contradicted the very idea on which it now relies.

The instruction says, in effect, "You may punish for harm to others to the extent that the public was misled about the dangers of cigarettes." Thus, proposed No. 34 would have asked the jury to assess punishment to the extent that nonparties were defrauded – or others were harmed. That is exactly what this Court prohibited.[9]

4. Philip Morris's No. 34 would have encouraged the jury to punish for harm to others

The last sentence of Requested Instruction No. 34 also contradicts this Court's central holding in this case. In discussing the relevance of defendant's financial condition[10] to the amount of punitive damages, request No. 34 says:

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[9] Further, as Mrs. Williams pointed out, this part of proposed No. 34 would have allowed punitive damages only on plaintiff's fraud claim. The claim for negligence would also have supported punitive damages, though the jury did not ultimately award punitive damages on that claim. Pet. App. 37a. There was no legal basis to limit punitive damages to the fraud claim as the proposed instruction would have done by limiting punitive damages to punish for risks that were "unlawfully misrepresented by the defendant."

[10] Before this Court last term, Respondent pointed out the contradictory treatment of the defendant's "financial condition" as both proper and improper at once. *Compare* J.A. 31a with J.A. 33a (paragraphs 6 with 11). Williams, Respondent's Brief, 05-1256, 48 (Sept. 15, 2006). While Philip Morris responded that the paragraphs were alternative language, Philip Morris, Petitioner's Reply Brief, 05-1256, 6 n.4 (Oct. 17, 2006), the paragraphs were plainly not alternatives but were intended to coexist. The self-contradictory nature of this treatment of "financial condition" also provides adequate grounds for the Oregon courts to reject the requested instruction.

> Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. . . . [Still,] the paramount consideration remains the degree of reprehensibility of any misconduct and *the extent of any harm caused by such misconduct.*

J.A. 33a (emphasis added). The instruction supplements reprehensibility with another "paramount consideration," "the extent of *any* harm caused by the misconduct." The language would permit the jury to punish for any harms without qualification, creating precisely the risk that the jury might punish defendant "directly [for] . . . harms it is alleged to have visited on nonparties." *Williams II*, 127 S.Ct. at 1064. The trial court did not err in refusing to give this requested instruction.[11]

C. OREGON LAW REJECTING SUCH FLAWED JURY INSTRUCTIONS IS FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

This Court has made clear that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna,* 534 U.S.

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[11] Oregon law also holds that an incomplete instruction is properly refused "even though other instructions given may supply the omitted part of the requested instruction." *Stanich v. Buckley,* 368 P.2d 618, 621 (Or. 1962). Requested Instruction No. 34, *inter alia,* failed to instruct the jury on the proper uses of "harm to others" evidence. Such an instruction is necessary to clarify that the jury may consider such evidence in assessing reprehensibility.

362, 376 (2002), quoting *James v. Kentucky,* 466 U.S. 341, 348 (1984). That statement acknowledges, as this Court has done on repeated occasions, that this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground. *See Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945).

It is only in a "limited category" of "exceptional cases," essentially when a court engages in an "exorbitant application of a generally sound rule," that a state bar may prove inadequate. *Lee,* 534 U.S. at 363. Established state rules have been set aside as inadequate only when they appear calculated to discriminate against federal law, or, as one leading treatise puts it, fail to afford a litigant "a reasonable opportunity to assert federal rights." 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4027, at 392 (2d ed. 1996) (hereinafter Wright & Miller). *See, e.g., Douglas v. Alabama,* 380 U.S. 415, 422-23 (1965) (rule requiring continuous repetition of identical constitutional objections); *Davis v. Wechsler,* 263 U.S. 22, 24 (1923) (rule waiving jurisdictional objections upon entry of appearance of federal defendant's successor-in-interest). This is not one of those exceptional cases.

1. Philip Morris Had Ample Notice of the "Correct in All Respects" Requirement

To be valid, this Court has held that the state rule must not be novel or sprung upon a litigant without notice, *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457 (1958) or amount to an "arid ritual of meaningless form." *Staub v. City of Baxley,* 355

U.S. 313, 320 (1958). Oregon's "correct in all respects" rule does not fit within those exceptional categories. It has been consistently applied in at least 26 cases over the last 92 years. *See* App. 24a-26a (listing cases). Philip Morris's repeated claims that it "lacked fair notice" of the rule cannot be sustained. Br. 13, 26, 35, 39.

The rule was considered "well settled" nearly 50 years ago. *Wiebe v. Seely,* 335 P.2d 379, 393 (Or. 1959). Indeed, it was first adopted by the Oregon Supreme Court 92 years ago in *Sorenson v. Kribs,* 161 P. 405, 409-410 (Or. 1916), where the issue was whether a flawed instructional request still sufficed to "call the attention of the court to the matter" or, on the other hand, whether it could be properly denied for those flaws. Siding with the "great weight of authority," the Oregon Supreme Court held:

> In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.

Id. at 410. (quotation omitted).

Since then, Oregon courts have consistently insisted that requested instructions be clear and correct in all respects, including in a decision one year before trial in this case. *See Hernandez v. Barbo Machinery Co.,* 957 P.2d 147, 151 (Or. 1988). Thus, instructions that contained valid elements are still

properly refused because of "objectionable language," *Simpson v. Sisters of Charity of Providence in Oregon,* 588 P.2d 4, 13 (Or. 1978); because they called upon the jury to make inferences outside the pleadings, *Dacus v. Miller,* 479 P.2d 229, 231-32 (Or. 1971); because they failed to "embod[y] the essentials as set out" in the relevant statute, *McCaffrey v. Glendale Acres Inc.,* 440 P.2d 219, 222 (Or. 1968); and because they contained erroneous descriptions of the relevant statute. *Roop v. Parker Nw. Painting Co.,* 94 P.3d 885, 904 (Or. Ct. App. 2004). Abundant Oregon authority reiterates the rule. *See* Williams, Appendix to Brief in Opposition, No. 07-1216, 27a-28a (Apr. 23, 2008) (hereinafter "Opp. Cert. App."). Requested instruction No. 34 contained multiple fatal flaws that the Oregon courts and Mrs. Williams had identified. *See* pp. 20-25 *supra*. Philip Morris has no claim that it lacked notice of this longstanding rule's application.

Nor was the rule given "hyper-technical application" here, as Philip Morris claims. Br. 36. Rather, it was applied in a manner familiar to all Oregon lawyers. Oregon practice materials (including one co-authored by Philip Morris's trial counsel in this case)[12] uniformly advise trial counsel they should not intermix different legal propositions

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[12] Oregon State Bar, APPEAL AND REVIEW § 14.74 (2002 Supplement) (citing *Hernandez v. Barbo Machinery Co.,* 957 P.2d 147 (Or. 1998) and stating "if it would be error to give any part of proposed instruction, court does not err in refusing to give instruction," written by Jay Beattie, Meagan Flynn, and Gene Hallman). Mr. Beattie argued the jury instruction issue for Philip Morris at trial. J.A. 11a-29a.

within a single requested jury instruction.[13] Philip Morris easily could have submitted a revised request, and its argument that such an effort would have been futile or useless is, on this record, wholly unsupported.

2. Circumstances Did Not Justify an Exception to the Rule

While there are instances when an otherwise legitimate rule might operate improperly and cause the state law bar to fall outside those this Court must respect, this is not one of those cases. In *Lee,* for example, an "unusual sequence" of "rapidly unfolding events that [the litigant] and his counsel could not have foreseen, and for which they were not at all responsible" placed the case "within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." 534 U.S. at 378, 381 (internal quotations omitted). Three essential factors distinguish *Lee*. First, the trial judge denied Lee's motion on grounds that not even perfect compliance with the procedures could have overcome. *Id*. at 381. Second, "no published [state] decision direct[ed] flawless compliance." *Id*. at 382. Finally, "and most important, given 'the realities of trial,' Lee substantially complied with [the state's] key Rule." *Id*.

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[13] *See, e.g.,* Oregon State Bar, APPEAL AND REVIEW § 9.23 (2006) ("On review, jury instructions are to be considered as an entirety."), citing *Parmentier v. Ransom,* 169 P.2d 883 (Or. 1946); Oregon State Bar, CIVIL PLEADING AND PRACTICE § 39.7 (2006) ("separate complex instructions into several consecutive instructions . . . [to] reduce the likelihood that the trial court will reject an entire multifaceted special instruction.").

In contrast with *Lee,* the experienced and well-resourced party and its counsel in this case were not surprised by any rapidly unfolding turn of events beyond their control. Instead, Philip Morris offered a deliberately drafted, multi-subject instruction—and then expressed satisfaction with the trial judge's resolution of the "harm to others" issue. J.A. 20a. Also unlike *Lee,* the trial judge here did not deny Philip Morris's requested instruction on grounds that could not be overcome by compliance with the pertinent Oregon rule. After the closing arguments that triggered this Court's concern last time, Philip Morris could have offered an instruction limited to the "harm to others" issue, which would have allowed it to assert error in its denial. That type of compliance with the rule would have removed the state-law objections that are central to the current dispute.

Moreover, Philip Morris has demonstrated in trying other cases in Oregon that it understands the rule. In the 2002 trial of *Estate of Schwarz v. Philip Morris, Inc.,* No. 0002-01376, Philip Morris submitted multiple, separate jury instructions on punitive damages, including one that simply stated, "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." App. 22a. The Oregon Court of Appeals found error in the trial court's refusal to give that instruction. 135 P.3d 409, 429 (Or. Ct. App. 2006). Plainly, the Oregon courts are not hostile to Philip Morris or this due-process principle. They merely insist on following procedures, and Philip Morris has demonstrated that it does know how to do so.

In this case, however, Philip Morris's lack of substantial compliance with the rule is palpable and cannot be explained away by the "realities of trial."

3. *State v. George* is Inapposite

Philip Morris claims that Oregon does not regularly follow the "correct in all respects" rule, accusing the Oregon Supreme Court of failing to apply the *George* decision. *See* Br. 36.[14] The argument is unavailing. *George* involved a statute that "unequivocably places the responsibility for giving the requested instruction on the trial court, without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." 97 P.3d at 661-62. It was therefore irrelevant whether defendant had requested a correct instruction or whether he submitted any request at all. The court's observation upon which Philip Morris relies, concerning the futility of submitting a revised instruction when the trial court said any instruction would be unconstitutional, were therefore *dicta*. *Id*. Moreover, because no similar ruling occurred here, the observation is utterly inapplicable.

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[14] Philip Morris originally relied upon *George* in its opening brief before the Oregon Supreme Court after remand in light of *State Farm* solely for the proposition that the "correct in all respects" rule didn't matter because it objected to the instruction actually given. App. 16a-17a. It was only after the Oregon Supreme Court held that Philip Morris had failed to preserve any error in the instruction given, Pet. App. 52a, that Philip Morris devised its "futility" claim based upon *George*.

Philip Morris argues that *George* is simply the culmination of a "long line of Oregon cases," citing just five cases, only one of which involved jury instructions. Br. 37 n.9, citing *Oregon v. Brown,* 800 P.2d 259, 266 (Or. 1990) (failure to instruct on causation in aggravated murder case); *Oregon v. Hitz,* 766 P.2d 373, 376 (Or. 1988) (acquittal for failure to prove element of crime); *Oregon v. Mack,* 183 P.3d 191, 194 (Or. Ct. App. 2008) (failure to prove element of crime in trial without jury); *Oregon v. Doern,* 967 P.2d 1230, 1233 (Or. Ct. App. 1998) (improper time limit on closing argument); *Oregon v. Martin,* 897 P.2d 1187, 1189 (Or. Ct. App. 1995) (argument concerning suppression of evidence not preserved).

George, however, is not a "correct in all respects" case and does not address the application of that rule. The case centered on a criminal statute that placed the onus of proposing instructions on trial courts and not on parties. Philip Morris's position that *George dicta* should nullify the "correct in all respects" rule *sub silento* should be rejected. The "correct in all respects" rule has been consistently applied for nearly a century, both before this case's trial and subsequent to *George. See, e.g., Moe v. Eugene Zurbrugg Const. Co.,* 123 P.3d 338, 345 (Or. Ct. App. 2005). It was appropriately applied here.

Even if *George* could be read to create a futility exception, no futility is evident here. The trial court did not refuse to address Philip Morris's "harm to others" concern and sought and obtained Philip Morris's approval of language to address it. The Oregon Supreme Court specifically found that Philip Morris's complaint of "futility" was groundless on this record. Pet. App. 16a n.5. That determination is

dispositive. *See Osborne v. Ohio,* 495 U.S. 103, 123 (1990). Philip Morris had ample opportunity to file a correct request for the instruction.

D. THE "CLEAR AND CORRECT IN ALL RESPECTS" RULE WAS APPLIED IN ITS TRADITIONAL MANNER

Philip Morris attacks Oregon's "correct in all respects" ruling by asserting that it "marks the *first* and *only* time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, . . . simply because it appeared under the same heading as a defective instruction on an entirely distinct point of law." Br. 13. Thus, Petitioner does not assert, as it did in its Petition, Pet. 25-27, that the "clear and correct in all respects" rule is novel,[15] not firmly established, or not regularly followed, because such an attack on a nearly century-old, standard part of Oregon practice cannot be plausibly maintained. Instead, its real complaint is that the rule was applied differently in this case than it has applied in others.

Unlike Mrs. Williams, Philip Morris chose to depart from the approved standard punitive damage

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[15] In Philip Morris's Question Presented in its Petition, it asserted that the "correct in all respects" rule was interposed "for the first time in the litigation" by the Oregon Supreme Court's most recent decision. Pet. i. That contention was dropped from the Question Presented (Pet. i) and from its Brief on the Merits entirely, for good reason. *See* Williams, Brief in Opposition, No. 07-1216, 15-16 (Apr. 23, 2008) (hereinafter "Opp. Cert.").

jury instruction by rewriting it entirely.[16] In Oregon, departures from standard jury instructions receive intense scrutiny, because it is well-known that instructions offered by parties are almost always slanted in some way.[17] As a result, the Oregon Supreme Court has uniformly held that a "requested instruction [must be] clear and correct in all respects, both in form and in substance, and [is properly denied] unless it is altogether free from error." *Beglau,* 536 P.2d at 1256 (citations omitted). Trial courts "cannot be required to edit requested instructions and to omit parts that are incorrect or inapplicable." *Id*.

Nonetheless, Philip Morris tells this Court that

> in every decision applying the "correct in all respects" rule dating back at least to the 1916 *Sorenson* case, the issue was whether the proposed instruction's treatment of a particular subject was a correct statement of the specific legal proposition the litigant was raising on appeal.

Br. 40. Plainly, the rule applied in Oregon and other jurisdictions requires a proposed instruction be "clear

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[16] It is axiomatic that "many states with pattern or standardized instructions either require or strongly recommend that they be used when available." Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions,* 66 BROOK. L. REV. 1081, 1086 (2001).

[17] Philip Morris's attempt to advise the jury that it may only punish the company for its motivation to obtain "illicit" profits, while also reminding the jury that cigarette sales are legal in Oregon, is an example of seeking just such an improper advantage. J.A. 30a-32a.

and correct in *all* respects," not merely that aspect which is the subject of appeal. The primary purpose of the rule — to require the requesting party to insure that the instruction comports with all applicable law and avoid imposing editorial duties on trial judges — would be undermined entirely by the rule that Philip Morris now proposes. No rule is necessary if a litigant misstates the central legal dispute in the proffered instruction; it is only of moment if the instruction as a whole is defective.

Philip Morris's approach, at odds with the rule's plain meaning, as well as Oregon practice guides that constantly remind counsel to separate their requests into distinct propositions,[18] would turn the "correct in all respects" rule into one that merely requires the instruction be correct in *some respect*.

No jurisdiction that has ever followed the rule has read it in the limited fashion Philip Morris suggests. *See, e.g., Beaver v. Taylor,* 93 U.S. 46, 54 (1876) (emphasis added) (no error in refusing an instruction where it "was presented as one request; and, *if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained*."); *Harvey v. Tyler*, 69 U.S. 328, 338 (1864) ("court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked

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[18] *See, e.g.,* Oregon State Bar, CIVIL PLEADING AND PRACTICE § 39.7 (2006):

> PRACTICE TIP: The lawyer should separate complex instructions into several consecutive instructions with just one main point of law contained in each instruction. This practice will reduce the likelihood that the trial court will reject an entire multifaceted special instruction.

separately, ought to have been given"); *Wiley v. Young,* 174 P. 316, 317 (Cal. 1918) ("If the instruction was offered as a whole, then, if any one of these paragraphs is erroneous, the whole was properly refused."); *Duncan v. Strating,* 99 N.W.2d 559, 562 (Mich. 1959) (quotation and citation omitted) ("A trial judge may properly decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to rewrite the request in proper language.").

More critically, Oregon has consistently applied the rule as it was applied in this case, where the basis for rejecting the instruction was different than the legal point raised by appellant. *See Oregon v. Reyes-Camarena,* 7 P.3d 522, 528 (Or. 2000) (no error in refusing to give proper "mitigating factors" instruction when combined with improper death penalty "sympathy" instruction); *Owings v. Rose,* 497 P.2d 1183, 1188 (Or. 1972) (proposed instruction properly rejected even if correct about third-party liability but incorrect by also requiring that defendants' negligence be the sole cause of damage); *Schultz v. Shirley,* 220 P.2d 86, 88 (Or. 1950) (denying error in refusal to give "requested instruction [that] includes three different propositions," one of which was erroneous); *Hotelling v. Walther,* 148 P.2d 933, 935-36 (Or. 1944) (proper "less satisfactory evidence" instruction properly rejected because it was part of a request that included other instructions irrelevant to the case); *Burke v. American Network, Inc.,* 768 P.2d 924, 926-27 (Or. Ct. App. 1989) (both plaintiff's and defendant's proposed instructions properly rejected, even if correct on one point, because they were incorrect on others).

Philip Morris cites several cases without analysis that supposedly support its contrary proposition. Br. 40 n.10. The cases, however, lend no support to its contention. *See Beglau,* 536 P.2d at 1256 (where the court held that a requested instruction would have provided no basis for appeal because two of the six legal requirements it contained "have no application to this case" and would have required the trial court "to make various deletions in preparing an appropriate instruction."). *See also Owings,* 497 P.2d at 1188 (one of two unrelated portions of requested instruction was incorrect and trial court is not obliged "to give the correct portions of one which includes errors.").

Defendant's claim that Oregon has never rejected an instructional request because of the inaccuracy of other parts of the request is erroneous. The Oregon Supreme Court has consistently rejected appeals involving jury instructions for the longstanding and well-recognized reason that they are not correct in all respects, that a trial court is not required to give correct portions of an instruction that includes errors in other respects, related or not, and that the trial court therefore does not err in refusing to give such instructions.

E. PHILIP MORRIS MISUNDERSTANDS THE MEANING OF THE RULE

Philip Morris makes two other arguments based on a misapprehension of the "correct in all respects" rule. First, it treats the trial court's consideration of its request "line by line" as voiding the operation of the rule. Second, it conflates the rule with rules concerning preservation of error.

1. The "Correct in all Respects" Rule is a Rule of Appellate Practice

Philip Morris argues that the trial court's line-by-line consideration of its request No. 34 somehow voids the operation of the "correct in all respects" rule, or distinguishes this case from the long line of others applying the rule as the Oregon Supreme Court did here. Br. 39-40. The reality of trial practice reveals, however, that contested jury instructions are typically considered "line by line." There is no other useful way to discuss them. Parties routinely argue over the specific language of their opponents' requests. Particular words are contested, compromises reached, and rulings made based on advocates' perceived nuances of meaning and advantage, as well as trial judges' ideas of balance and fairness. Unless an instruction is completely inapplicable to the facts, its specific language is what the court and counsel discuss in any charge conference. The trial court's consideration of specific language is hardly unique to this case.

Even so, Philip Morris misapprehends the nature of the rule because it is not a rule of trial court procedure, but a principle of appellate review that promotes judicial efficiency and imposes on parties responsibility to submit fully accurate jury instruction requests at trial. It is evident from the normal piecemeal consideration of instructional requests in the trial courts that the rule is not a rule to be applied at trial. Otherwise a single flaw would render consideration of other parts superfluous. In response to objections, trial courts require explanation as to what, precisely, is wrong with a request. Rejecting that portion does not end the task,

as courts continue to move word by word through the requests. To be sure, the trial court is not required to edit instructional requests for the parties, but in practice, the court and the parties work together to reach either accommodation or a definitive ruling on the language of a particular instruction. Though it is not required to, the trial court has the opportunity, with the parties' help, to craft an instruction which it believes will remove the instruction as an issue on appeal. An appellate court, of course, cannot do this.

It is on appeal that the "correct in all respects" rule becomes relevant. At that point, nothing can be done to alter the language of an instruction the trial court rejected. The rule applies to define what is or is not trial court error — to allocate among the parties the risk of reversal or affirmance: it "require[s] that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give." Pet. App. 14a; *cf. Greenlaw,* 128 S.Ct. at 2564. Yet Philip Morris assumes *no* responsibility for the fact that its proposed jury instruction No. 34 was erroneous in multiple respects and assumes *no* responsibility for its failure to take any steps to cure these errors.

Because trial court judges are under no obligation "to correct or edit the portions of [a proposed] instruction that are in error or inapplicable," *Beglau*, 536 P.2d at 1256; *Owings*, 497 P.2d at 1188. Philip Morris has only itself to blame for its erroneous statements and for choosing to stand by its original proposed instruction rather than correct its defects.[19] It conceded as much on remand to the

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[19] Philip Morris appears to have considered redrafting. After the trial court determined that instruction No. 34 was

Oregon Supreme Court, when it admitted that "[t]here probably are other ways that one party or defendant could raise the need for [due process] protection." App. 5a-6a. (counsel for Philip Morris). In contrast, Philip Morris revised its proposed jury instructions in *Bullock v. Philip Morris USA, Inc.,* 71 Cal. Rptr. 3d 775, 797-98 (Cal. App. 2 Dist. 2008), *five times*.

The law in Oregon is clear: "If a party wishes to rely on the failure to give a requested instruction at trial as error on appeal, it must formulate a *correct* instruction and request that the trial court give it." *Baker,* 26 P.3d at 842. (emphasis added). Because the "correct in all respects" rule is a rule of appellate review, and not of trial procedure, defendant's argument that it was waived or voided by the trial court's line by line review is erroneous.

2. The "Correct in All Respects" Rule Is Not about Preservation of Error

Philip Morris erroneously treats the basis of the Oregon Supreme Court's ruling as the application of an error preservation rule, at one point calling it a "state default rule." Br. 20, 25. It even claims that three dissenters in *Williams II* "found merit in plaintiff's waiver argument." Br. 20. Yet, that dissent acknowledges that Philip Morris preserved its objection to denial of its request; it just didn't object

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erroneous in part because of its language about illicit profits, Philip Morris's trial counsel stated that he would "work out with [Mrs. Williams' counsel] basically a modification of [respondent's]" proposed instruction. J.A. 26a. But, again, Philip Morris never proposed revised instructions on the harm issue.

to the charge actually given. *Williams II*, 127 S.Ct. at 1068 (Ginsburg, J., dissenting).

Based on this mistake, Philip Morris argues this case as if were about preservation of error. The Oregon Supreme Court, however, has held that failure to preserve error is different from absence of error where a trial court declines to give a requested instruction that is not correct in all respects:

> to preserve an error in failing to give a requested instruction, the aggrieved party need not make any further objection; . . . However, the failure to give a requested instruction *is not error* if the requested instruction was not correct in all respects.

Bennett v. Farmers' Ins. Co., 26 P.3d 785, 795 (Or. 2001) (emphasis added). *See also Leiseth v. Fred Meyer, Inc.,* 57 P.3d 914, 916 (Or. Ct. App. 2002) (citation omitted) ("Even if the claim of error is adequately preserved, failure to give a requested instruction is not error unless the instruction is correct in all respects."). The Oregon Supreme Court followed the same path in this case. Pet. App. 14a ("correct in all respects" rule is a "well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction").

It is no answer to the decision below to argue, as Philip Morris does, that it preserved an objection to the court's refusal to give its requested instruction. The trial court's failure to give an instruction *is not error* unless the instruction requested was clear and correct in all respects.

F. OREGON HAS SUBSTANTIAL AND LEGITIMATE INTERESTS IN APPLYING ITS RULES GOVERNING JURY INSTRUCTIONS

Philip Morris asserts that the "'correct in all respects' requirement serves no legitimate purpose." Br. 30. Petitioner only partially describes the rule's purpose when it says the rule merely ensures that "trial judges are fairly apprised of a party's request, and … avoid[s] placing on the trial judge the burden of editing an incorrect" instruction. *Id.* Thus, Philip Morris repeats its error in treating the requirement as a rule of trial procedure that can be overcome by preservation of error. Yet, as demonstrated at pp. 38-40 *supra,* it is a rule of appellate review that treats denial of a partially incorrect instruction as the absence of error.

The requirement of "legitimate purpose" invoked by Philip Morris, even if applicable to civil actions,[20] is fully satisfied here. Although the Oregon courts have not had to justify the rule, the "correct in all respects" rule obviously furthers significant legitimate state interests. For example, it "serves the State's important interest in ensuring that counsel do their part in preventing courts from providing juries with erroneous instructions," an interest this Court deemed sufficient in *Osborne*, 495 U.S. at 123. Philip Morris ignores the fact that the Oregon Supreme Court noted this purpose in its decision below. Pet. App. 14a ("[t]he effect of that standard is to require that a party to litigation take

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[20] It has been suggested that the requirement is inapplicable to civil actions. *See* 16B Wright & Miller § 4028.

responsibility for the jury instructions"). It thus is an important element in avoiding flawed trials, an interest Oregon regards as constitutionally mandated. *Hoag v. Washington-Oregon Corp*., 147 P. 756, 765 (Or. 1915) (holding that the Oregon Constitution commands "faultless" jury trials, which depend, in part, on "a jury correctly instructed as to the law."). It also minimizes costly retrials, as well as helps achieve finality in judgments. Cf. *Patrick ex rel. Estate of Patrick v. State*, 36 P.3d 976, 981 (Or. Ct. App. 2001) (recognizing appellate rules often reflect "strong policy favoring the finality and effectiveness of judgments").

Moreover, because the trial judge has no obligation to rewrite a party's faulty proposal, *see Brigham v. Southern Pac. Co.,* 390 P.2d 669, 671 (Or. 1964), and offering the incorrect instruction would be reversible error, the "correct in all respects" rule can only be regarded as a sound principle of judicial administration. As such, it facilitates the broad system-related goals of facilitating the administration of claims and promoting judicial efficiency. *Cf. John R. Sand & Gravel Co. v. United States,* 128 S.Ct. 750,753 (2008).

At the same time, the rule creates no inherent conflict with the remedial objectives of federal Due Process. It is not "outcome-determinative" in the sense discussed in *Felder v. Casey,* 487 U.S. 131, 141 (1988). Thus, as in *Johnson v. Fankell,* 520 U.S. 911, 918 (1997), the Oregon Supreme Court's ruling "rest[s] squarely on a neutral state Rule regarding the administration of the state courts."

II. OREGON LEGITIMATELY CONSIDERED STATE LAW ISSUES ON REMAND

A. THE QUESTION OF THE PROPRIETY OF PHILIP MORRIS'S JURY INSTRUCTION REQUEST UNDER STATE LAW WAS PART OF THE NEW CONSTITUTIONAL STANDARD ON THIS COURT'S REMAND

Philip Morris argues that the question whether its multifaceted jury instruction request was "correct in all respects" was not properly before the Oregon Supreme Court below because this Court's last grant of certiorari "implicitly rejected" plaintiff's argument that the instruction request was not correct in all respects. Br. 21. It also complains that, in applying the "correct in all respects" rule, the Oregon court therefore "re-examined" the premise of this Court's decision — that a proper request had been made. *Id*.

Petitioner's argument ignores the explicit terms of the constitutional standard this Court enunciated on remand to the Oregon court: "a court, *upon request*, must protect against" a significant risk of jury confusion over the proper use of harm to others in evaluating punitive damages "*in appropriate cases*." *Williams II*, 127 S.Ct. at 1065 (emphases added). Because the only request worthy of consideration is a proper one, the proper request requirement was part of the new[21] constitutional standard this Court instructed the Oregon Supreme

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[21] This Court recognized that it was enunciating a new constitutional standard. *Williams II*, 127 S.Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

Court to apply on remand. The Oregon court properly considered the question whether Philip Morris had made a proper request under Oregon law:

> [W]e understand the Court's use of the phrase, "upon request," . . . to be an acknowledgment of the authority of states to place reasonable procedural requirements on any request for instructions, including requests like the one at issue here. Our treatment of this topic in the pages that follow is based on that understanding, and on the belief that Oregon's rule concerning the correctness of requested instructions is a reasonable allocation of responsibility to parties to a jury trial.

Pet. App. 13a n.4 (citation omitted). The Oregon Supreme Court followed the terms of this Court's remand when it reviewed whether Philip Morris's Request No. 34 was a proper request under Oregon law. Far from "implicitly rejecting" Mrs. Williams' argument, this Court had made it part of the question on remand. The Oregon Supreme Court properly ruled on the question.

Philip Morris cites several cases for the proposition that this Court's grant of certiorari establishes that state law was satisfied and thus constitutes as "law of the case." Br. 15-17, 21-25. Yet, in none of those cases, did this Court create an "upon request" standard. This Court's decision in *Williams II* thus differs from the standard announced in *State Farm*, where this Court found that an instruction on extraterritoriality was mandatory and not dependant

upon a request. *See State Farm, 5*38 U.S. at 422 ("A jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.") (emphasis added). Because a *Williams* instruction is triggered only by a "request," this Court clearly anticipated that States would rely upon the party-presentation principle in discharging this duty. The Oregon Supreme Court held that Philip Morris failed to meet that responsibility.

No case Philip Morris cites to argue otherwise is factually or procedurally on point. In *Stanton v. Stanton,* 429 U.S. 501, 503 (1977), the Utah Supreme Court rejected the federal Equal Protection claim upheld by this Court as "blind to the biological facts of life." In *United States v. Williams,* 504 U.S. 36 (1992), the only issue was whether Congress or the Constitution had authorized a federal circuit court to develop the rule it imposed. Here, there can be little doubt that the Oregon Supreme Court has the "premier hand" in matters of state judicial administration. *Oregon ex rel. Johnson v. Dale,* 560 P.2d 650, 654 (Or. 1977).

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) is also inapposite. There, no law of the case was established. Instead, this Court faulted the Virginia court for inconsistently following a rule that this Court found was "more properly deemed discretionary than jurisdictional." *Id*. at 234.

NAACP v. Alabama ex rel. Patterson, 360 U.S. 250 (1959)(per curiam), is wholly inapplicable as it holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first*

time after remand and based on inconsistently followed procedural obstacles. 360 U.S. at 242-43; *NAACP v. Alabama,* 357 U.S. 449, 457-58 (1958). Mrs. Williams' repeatedly reiterated objections and the uniformity with which Oregon has followed its "correct" rule distinguish this case from that controversy.

Unlike this case, *Smith v. Texas,* 127 S.Ct. 1686, 1690 (2007), involved a state court that predicated its procedural bar "on a misunderstanding of the federal right" at issue. In addition, the litigant opposing relief was attempting to assert "a procedural bar different from and indeed contradictory to the one it now raises." *Id*. at 1694. Here, Mrs. Williams consistently asserted the grounds upon which the Oregon Supreme Court determined that there was no error in refusing Philip Morris's requested instruction.

B. THE SEQUENCE OF CONSIDERATION IS NOT FEDERALLY MANDATED

Philip Morris argues that, because Oregon often applies a "first things first" doctrine under which state law questions are ordinarily decided before federal constitutional questions, it was somehow "implicit" in the Oregon Supreme Court's prior decision[22] on the federal issue that there was no procedural defect in Philip Morris's jury instruction request. Br. 14, 40-42. There is no Oregon authority for such a contention.

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[22] Philip Morris refers to "prior decisions" (Br. 14) while, of course, the Oregon Supreme Court had made only one prior decision on the merits in this case.

The Oregon practice of considering state law issues before reaching federal issues is based on the practical logic that, if state law grants a party complete relief, the state cannot have violated that party's federal rights, and federal law need not be considered. *See Sterling v. Cupp,* 625 P.2d 123, 126 (Or. 1981) (Linde, J.). That prudential state practice does not confer on a party any right to avoid the consideration of state law whenever a court has previously relied on federal law for its decision. Here, Philip Morris, on remand, made the federal issues its first assignment of error. App. 7a-10a. Thus, it asked the Oregon courts to take up federal issues first. While Philip Morris suggests that the "first things first" approach confers a right that overtakes state law, it cites no authority for that novel proposition.

Yet, as Justice Alito has pointed out, "in cases in which this Court has reversed a state-court decision based on a possible federal constitutional violation, it is not uncommon for the state court on remand to reinstate the same judgment on state-law grounds." *Smith,* 127 S.Ct. at 1703 (Alito, J., dissenting) (collecting cases). In a similar vein, this Court has recognized the "settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935). As Justice Marshall observed, "to suggest that the Oregon Supreme Court is foreclosed from considering the respondent's state-law claims …[would be an] unprecedented assumption of authority … as much a surprise to the Supreme Court of Oregon as it is to me." *Oregon v.*

Hass, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting).

The Oregon Supreme Court's consideration of state-law issues on remand is in no sense a "re-examination" of the underpinnings of *Williams II.* The court, as did this Court in *Williams II,* recognized that Philip Morris had preserved its due-process argument for appellate review in the context of the failure to give its proposed instruction No. 34. *See Williams II,* 127 S. Ct. at 1069 (Ginsburg, J., dissenting) (noting that Philip Morris preserved no other objection). That allowed Philip Morris to press its view of federal due process on appeal. Its successful preservation of that objection, however, could not foreclose consideration of a remaining state-law issue, specifically, whether it was error for the trial court to refuse a requested instruction that was not clear and correct in all respects.

Nothing in federal law requires a state court to dispose of state issues first. *Oregon v. Kennedy,* 456 U.S. 667 (1982) is instructive. As this Court explained, the Oregon Court of Appeals decided a case based on the federal Double Jeopardy Clause. *Id*. at 671. This Court reversed, finding treatment of the federal issue erroneous and remanding for proceedings not inconsistent with its opinion. *Id*. at 679. On remand, Oregon's Supreme Court agreed with the prudential idea that state courts should ordinarily decide dispositive state-law issues first, but nonetheless addressed the state-law issue. *Oregon v. Kennedy,* 666 P.2d 1316 (Or. 1983). Given that the court had declined review without explanation during the case's first journey through the appellate system, the court said that failing to

address the state-law issues on remand would burden the court's system of discretionary review and place the successful party in an unreasonable position:

> the successful party who might prefer a decision on state grounds has no reason to petition us for review. Surely a practice that requires a winning party to seek review solely in order to shift a favorable judgment from federal to state grounds is wholly unreasonable, apart from its logical flaws.

Id. at 1319 (footnote omitted).

Philip Morris asks this Court to change Oregon law to make a prudential practice a mandatory federal rule imposed on the state courts as if this Court exercised supervisory authority over state judicial administration. Yet, however advisable it may be for "state courts to apply state law before reaching federal constitutional questions, [this Court has] never held that States are required to follow this sequence." *Smith,* 127 S.Ct. at 1703 (Alito, J., dissenting).

C. THE CASE'S PROCEDURAL CONTEXT EXPLAINS WHY STATE LAW ISSUES WERE CONSIDERED AFTER REMAND

The procedural history of this case suggests that this court's remand order in *Williams I* may have inadvertently truncated the Oregon courts' consideration of state-law issues. *Cf. Cohen v. Cowles Media Co.,* 501 U.S. 663, 672 (1991) (recognizing that the Minnesota Supreme Court's incorrect First

Amendment ruling "may well have truncated its consideration of" alternate state-law grounds).

Although the trial court rejected proposed instruction No. 34 on state-law grounds, which the Oregon Court of Appeals sustained, Pet. App. 140a, and the Oregon Supreme Court originally declined review, this Court accepted jurisdiction over the case and remanded it in light of *State Farm*. In response, on remand, the Oregon Court of Appeals and Oregon Supreme Court, first addressed only the federal due-process excessiveness and instructional issues. That approach is entirely consistent with the view that state courts may choose, in some circumstances, to address the merits of a federal issue first:

> [a state] court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.

Smith, 127 S.Ct. at 1703 (Alito, J., dissenting).

Once this Court issued its *Williams II* ruling on the federal instructional issue, the Oregon Supreme Court, on remand, recognized that it was obligated to consider the state-law basis for whether a proper request was made. Pet. App. 13a. The Court explained that it had previously failed to address that question, repeatedly urged by Mrs. Williams, because it believed it had correctly resolved the federal issue in her favor, leaving "no need to address those alternative reasons for affirmance." *Id.*

at 9a n.2. Because the Oregon court reasonably believed it had correctly resolved the federal issue in 2006, its earlier ruling should not, and traditionally does not, preclude it from reaching other issues that, on remand in 2007, were no longer superfluous.

D. FAILING TO CONSIDER PLAINTIFF'S STATE LAW OBJECTIONS WOULD HAVE VIOLATED PLAINTIFFS' FEDERAL DUE PROCESS RIGHTS

Mrs. Williams, no less than Philip Morris, has a due process right at stake in this case. Due Process protects all "civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429 (1982). As this Court stated in *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971), "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Just as Philip Morris must have "an opportunity to present every available defense." *Williams II,* 127 S.Ct. at 1063 (quotation omitted), Mrs. Williams must have the same opportunity.

Here, she assiduously raised and preserved state law objections to Philip Morris's proposed jury instruction on grounds that the Oregon Supreme Court reached only after learning that it had misapplied federal law. Mrs. Williams should not be denied the protections of state law, equally available to all parties, when, as Philip Morris itself concedes, she has argued repeatedly that the proposed

instruction was erroneous under state law. Br. 25 n.7. Indeed, it would be fundamentally unfair to permit Philip Morris to assign error to the trial court's failure to give instruction No. 34, so that it may preserve its federal due process argument for appellate review, and, at the same time, deny Mrs. Williams an opportunity to contest the propriety of the instruction as a whole, when, as the prevailing party, she could not have appealed on that basis. Instead, as both federal and Oregon law recognize, Mrs. Williams was "free to defend [the] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 478 n.20 (1979); *see also Outdoor Media Dimensions, Inc. v. Oregon,* 20 P.3d 180, 195-96 (Or. 2001).

Philip Morris's contention amounts to a novel theory of judicial waiver of a party's rights, applicable even when the party itself has done everything required of it to retain those rights. Due Process, properly understood, would not support such a theory. The Oregon Supreme Court was in fact obligated, on remand, to take up Mrs. Williams' state-law objections to the proposed instruction. Had it not done so, Mrs. Williams' due-process rights would have been violated.

III. PHILIP MORRIS'S BID FOR A NEW TRIAL IS IMPROPER

It is time for this litigation marathon to end. Jesse Williams' widow has courageously fought against great odds to bring this case to trial and prevailed nine years ago in an intensely contested,

well-managed five-week jury trial. The Oregon courts have reviewed this case, examining the record punitive damages award scrupulously, as this Court mandated in *Cooper Industries*, not just once but four times. With this trip to this Court, the case makes its third appearance over a period of five years.

There is no justification for this court to consider the "remedy" Philip Morris seeks of a new jury trial. At this late stage, after all the full briefings, exhaustive hearings, and multiple decisions, sending an individual without the resources and experience of its opponent back to square one again would epitomize the idea that justice delayed is justice denied.

Philip Morris bases its bid for a wholly new trial on the claim that it is unclear how the jury arrived at its $79.5 million verdict, (Br. 43), despite the fact that verdict has met repeated appellate approval. Yet, a retrial, at least a decade after the original trial in this case, cannot comport with the type of fundamental fairness that the Due Process Clause guarantees. The "'fundamental requirement of due process'" is "'the opportunity to be heard' *at a meaningful time* and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (citation omitted) (emphasis added).

A retrial today could not meaningfully present the issues. At the time of trial in 1999, Philip Morris vigorously denied that smoking caused cancer and had a long and unbroken history of asserting this denial publicly. Today, that is no longer true.

Besides the incredible expense that a retrial would incur for the Plaintiff, having the burden of

proof and relying on expensive expert evidence, Mrs. Williams, who is in poor health, would have to undertake the ordeal of testifying about matters now deeply in the past. The same justifications that exist for statutes of limitations apply with full force here. It is too late to retry a claim after "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 342, 348-49 (1944).

In addition, a re-trial would permit Philip Morris to correct tactics and strategies it employed in the first trial that may have backfired on it. For example, the company called a professor of Southeast Asian history as an expert on what media statements Jesse Williams might have read that would have led him to believe Philip Morris was trying to convince him that cigarettes were safe. Besides the obvious questions about the expert's qualifications, the expert unwittingly exposed a file to plaintiff's counsel that was marked so it wouldn't be used at trial. He then suffered a devastating cross-examination that surely had an impact with the jury. Trial Tr. Vol. 15-B at 83-95, Plaintiffs Ex. 175, Oral Argument in the Circuit Court of the State of Oregon, County of Multnomah, March 12, 1999)

Simply put, nothing has changed from this case's last appearance in this Court that would justify a "re-do."

CONCLUSION

This Court should dismiss the action for lack of jurisdiction or, alternatively, affirm the judgment below.

Respectfully submitted,

October 2, 2008

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APPENDIX A

Excerpts from the Transcript of Proceedings in the United States Supreme Court (October 31, 2006)

* * *

JUSTICE SOUTER: The difficulty that I have is because I think the instruction that was proposed on behalf of your client was not a clear instruction, I have great difficulty in seeing how I could find that it was error to refuse to give the instruction.

* * *

JUSTICE SOUTER: So my problem is, if I think they really did have the wrong view of the law but the issue was focused at the trial court by a request for an instruction which I think was properly denied, what do I do? Do I concentrate on what they said in the opinion or do I concentrate on what I think was the deficiency of the instruction?

MR. FREY: Well, I think what you do is decide the Federal issue, which I think is whether they were correct in the legal proposition that they asserted.

JUSTICE SOUTER: But then they would respond, when they made that, when they gave that explanation in the Oregon Supreme Court, they were responding to a claim of error which was focused and raised at the trial level by the request for an instruction, which strikes me as probably an unsound instruction, an unsound request.

JUSTICE SCALIA: Well, I guess we could leave it up to them whether they want to disallow the instruction for a different reason, but the fact is they disallowed it for the reason that you say.

MR. FREY: That's correct.

* * *

MR. FREY: But we anticipated the problem. We proposed an instruction which would as best we could at the time address the problem. Maybe it could be edited up to be a little sharper. But I think it contains the essential point that we're driving at here today.

APPENDIX B

Excerpts from the Transcript of Proceedings in the Oregon Supreme Court (May 10, 2005)

Before Justice DeMuniz
Justice Gillette
Justice Durham

* * *

JUSTICE DURHAM: Mr. Gary, I wanted to ask you a question. Is it your position that the remand for reconsideration in light of *State Farm* alters or relieves any preservation requirements that Oregon law might apply?

MR. GARY: No, it does not relieve. No, it does not. The same preservation rules require an issue that is not adequately preserved can be rejected by this court and that would be an adequate state ground. In this case the instructional error I'm talking about was adequately preserved.

* * *

APPENDIX C

Excerpts from the Transcript of Proceedings in the Oregon Supreme Court (September 11, 2007)

Before Justice DeMuniz
Justice Gillette
Justice Durham

* * *

JUSTICE DURHAM: One more bit of brush clearing. We are just talking about the adequacy of the offered instruction from your client. We're not talking about . . . charges that Oregon's procedures for the drafting and submission of jury instructions and the approval of jury instructions by the trial court . . . is somehow invalid are we. There's no problem with that is there.

MR. GARY: No.

JUSTICE DURHAM: Stated another way. Your client had a full opportunity to submit whatever instructions it wished and to get a legally correct instruction delivered by the trial court correct?

MR. GARY: Yes, and it took advantage of its procedural right by requesting that Defendant's instruction 34, sub 1, which was the paragraph that was set out in this court's prior opinion. Now, we believe that the Supreme Court decision in this case makes it very clear that the instruction that was requested was a correct statement of law. It addressed every one of the reasons that this court and the court of appeals had given previously for

saying that the instruction was not a correct statement of the law.

* * *

JUSTICE DURHAM: So you're saying that the Barbo principal of correct in all respects is not the law?

MR. GARY: I don't believe, I believe that that is the law qualified by not only George but the cases that came before it that talk about the reason for the preservation rule. The reason for the preservation rule is to make sure that the parties are not blindsided and the trial court is not blindsided. When the trial court says I don't want to give an instruction on the subject on harm to others, there isn't a requirement that the Plaintiff or the Defendant, whoever is requesting the instruction, refine the instruction and engage in the futile act of trying to persuade the trial court that it should change its mind.

* * *

JUSTICE DURHAM: Under that theory, would it not be your view that the trial court would have to act spontaneously, would it not, to draft an instruction on its own to meet that duty. That it could ignore the responsibility of the parties to submit accurate instructions beforehand?

MR. GARY: No. I don't think that's true, your Honor. There probably are other ways that one a party or defendant could raise the need for protection. I would assume that when it is raised, the trial court if it agreed that there was a

significant risk that the jury would be confused would ask, what do you want me to do?

JUSTICE DURHAM: Must you be correct today that your instruction was accurate in all respects in order to prevail on the state law question of the correctness of the trial court's rejection of your proposed instruction?

MR. GARY: No, because of the rule of *State v. George*.

* * *

APPENDIX D

Excerpts from Defendant-Respondent Philip Morris USA Inc.'s Brief on Remand from the United States Supreme Court (December 30, 2003)

IN THE COURT OF APPEALS FOR
THE STATE OF OREGON

Multnomah County Circuit Court
Case No. 9705-03957

Court of Appeals
A106791

MAYOLA WILLIAMS, Personal Representative of the Estate of JESSE D. WILLIAMS, Deceased,

Plaintiff-Appellant,
Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED, nka PHILIP MORRIS USA INC.,

Defendant-Respondent,
Cross-Appellant,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,

Defendants.

DEFENDANT-RESPONDENT PHILIP MORRIS USA INC.'S BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal From Judgment of May 25, 1999, and Order of June 22, 1999
Multnomah County Circuit Court
Honorable Anna J. Brown

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December 2003

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IN THE SUPREME COURT OF THE
STATE OF OREGON
Multnomah County Circuit Court
Case No. 9705-03957
CA A106791
SC S51805

MAYOLA WILLIAMS, Personal Representative of the Estate of JESSE D. WILLIAMS, Deceased,

Plaintiff
Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, nka PHILIP MORRIS USA INC.,

Defendant
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,

Defendants.

PETITIONER ON REVIEW PHILIP MORRIS USA INC.'S OPENING BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on remand by the United States Supreme Court, following defendant's appeal from a judgment of the Circuit Court for Multnomah County, Honorable Anna J. Brown

Opinion Filed: June 9, 2004
Author of Opinion: Edmonds, Presiding Judge
Before: Edmonds, Presiding Judge
Armstrong, Judge
Wolheim, Judge

Reversed in Part and Remanded

Filed: February 1, 2005

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3. The Court Of Appeals Erred In Holding That PMUSA's Requested Instruction Was Confusing

The Court of Appeals also noted, in a footnote, that the trial court did not commit instructional error because PMUSA's proposed instruction was "confusing." Williams III, 193 Or App at 557 n6. The court found the instruction "confusing" because it "informed the jury both that it may consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it may not punish defendant for the impact of its misconduct on others." Id. As discussed below, the court erred in affirming the verdict on this alternative basis because, among other things, PMUSA's proposed instruction was not confusing, but instead consistent with State Farm.

As an initial matter, the Court of Appeals' decision ignores that PMUSA did not simply propose the requested instruction; it also affirmatively objected to the instruction that was actually given. See Bennett v. Farmers Ins. Co., 332 Or 138, 154,26 P3d 785 (2001) (where a party claims an "error in the jury instructions given, the fact that the requested instruction was not correct in all respects is not determinative"). All that PMUSA was required to do was to "have pointed out that error or omission to the trial court" and to except "immediately after the court instructed the jury." Id. That is exactly what PMUSA did here. See supra Section Y.B.1. Because PMUSA properly objected to the jury instructions given, it is entitled to a new trial irrespective of whether its own proposed instructions contained errors and omissions. See, e.g., State v. George, 337 Or 329,97 P3d 656, 660 (2004) (even if requested instruction incorrect, trial court nonetheless required

to instruct jury, and failure to do so resulted in reversible error).

APPENDIX F

**Excerpts from
Defendant – Appellant Philip Morris USA Inc.'s
Excerpt of Record and Appendix in the Court
of Appeals for the State of Oregon,
in the Estate of Michelle Schwarz, deceased, by
and through her Personal Representative,
Richard Schwarz, v. Philip Morris
Incorporated, nka Philip Morris USA Inc., et
al., (June 2003)**

In the Court of Appeals for the State of Oregon
Multnomah County Circuit Court
Case No. 0002-01376
Court of Appeals
CA A118589

THE ESTATE OF MICELLE SCHWARZ,
deceased, by and through her Personal
Representative, RICHARD SCHWARZ,
Plaintiff-Respondent,
Cross-Appellant,
v.
PHll1P MORRIS INCORPORATED, nka
PHILIP MORRIS USA INC., a foreign
corporation,
Defendant-Appellant,
Cross-Respondent,
and
ROTHS IG.A. FOODLINER,
INCORPORATED, an Oregon corporation,
Defendant

DEFENDANT – APPELLANT PHILIP MORRIS USA INC.'S EXCERPT OF RECORD AND APPENDIX

Appeal From Judgment of May 12, 2002
Multnomah County Circuit Court
Honorable Roosevelt Robinson

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June 2003

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IN THE STATE COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH
Case No. 0002-01376

THE ESTATE OF MICELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon corporation,
Defendants.

DEFENDANT'S REQUESTED JURY INSTRUCTIONS (AMENDED)

Defendant requests that the Court give the following jury instructions, applicable under Oregon law.

DATED this 12th day of March, 2002.

LINDSAY, HART, NEIL & WEIGLER, LLP

By: James L. Dumas, OSB No. 77167
Jay W. Beattie, OSB No. 87163
Michael G. Harting, OSB No. 87239
Of Attorneys for Defendant
Philip Morris Incorporated

TRIAL ATTORNEY: James L. Dumas

DEFENDANTS REQUESTED INSTRUCTION
NO. 41

NO PUNISHMENT FOR HARMS SUFFERED BY ANYONE OTHER THAN THIS PLAINTIFF

You are not to impose punishment for harms suffered by persons other than the plaintiff before you.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); *BMW of N. America v. Gore*, 517 U.S. 559, 581 (1996).

DEFENDANT'S REQUESTED INSTRUCTION
NO. 42
(AMENDED)

NO PUNISHMENT FOR OUT-OF-STATE CONDUCT
(ALTERNATIVE TO INSTRUCTION NO. 41)

You are not to punish a defendant for the impact of its conduct on individuals in other states.

BMW of N. America v. Gore, 517 U.S. 559, 567-75 (1996); *Continental Trend Resources, Inc. v. OXY USA Inc.,* 101 F3d 634, 636 (10th Cir. 1996)

DEFENDANT'S REQUESTED INSTRUCTION
NO. 47

REASONABLE RELATIONSHIP

The size of any punishment must bear a reasonable relation or proportion to the harm suffered by the plaintiff because of the defendant's punishable misconduct - that is, to the nature and extent of the wrong done to the plaintiff. You are not to consider harms, if any, suffered by the plaintiff that were caused by conduct or events other than the conduct that you have found to merit punishment.

BMW of North America, Inc. v. Gore, 517 US 559, 580-82 (1996); Jensen v. Medley, 170 OrApp 42, 57-58, 11 P3d 678 (2000).

APPENDIX G

Oregon Cases Applying Clear and Correct in all Respects Doctrine

Bennett v. Farmers Ins. Co., 26 P.3d 785, 795 (Or. 2001) ("failure to give a *requested* instruction is not error if the requested instruction is not correct in all respects").

Oregon v. Reyes-Camarena, 7 P.3d 522, 528 (Or. 2000) (no error in declining instruction that "did not state the law correctly in all respects . . . regardless of whether that instruction was correct in part").

Coulter Prop'ty Mgmt v. James, 970 P.2d 209, 215 (Or. 1998) (no error if requested instruction is not correct in all respects).

Hernandez v. Barbo Mach. Co., 957 P.2d 147, 151 (Or. 1998).

***Simpson v. Sisters of Charity of Providence*,** 588 P.2d 4, 13 (Or. 1978) (requested instruction that "contained objectionable language" properly rejected).

Beglau v. Albertus, 536 P.2d 1251, 1256 (Or. 1975).

***Owings v. Rose*,** 497 P.2d 1183, 1188 (Or. 1972) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors.").

Dacus v. Miller, 479 P.2d 229, 232 (Or. 1971) ("trial court will be upheld in refusing to give a technically incorrect instruction even though, after mature consideration, an appellate court might

conclude that the giving of the instruction would not have constituted reversible error").

McCaffrey v. Glendale Acres, 440 P.2d 219, 222-223 (Or. 1968).

Oregon v. North, 390 P.2d 637, 639 (Or.), *cert. denied*, 379 U.S. 939 (1964).

Stanich v. Buckley, 368 P.2d 618, 621 (Or. 1962).

Wiebe v. Seely, 335 P.2d 379, 393 (Or. 1959) ("[I]t is well settled that if a requested instruction is not altogether free from fault, the court need not give it.").

Schultz v. Shirley, 220 P.2d 86, 88 (Or. 1950).

Mason v. Allen, 195 P.2d 717, 722 (Or. 1948).

Hotelling v. Walther, 148 P.2d 933, 935-936 (Or. 1944).

Morris v. Fitzwater, 210 P.2d 104, 108 (Or. 1941).

State v. Quartier, 247 P. 783, 783-784 (Or. 1926) ("requested instruction is always properly refused, unless it ought to have been given in the very terms in which it was proposed.").

Hooning v. Henry, 213 P. 139, 141 (Or. 1923).

Sorenson v. Kribs, 161 P. 405, 411 (Or. 1916).

Staten v. Steel, 191 P.3d 778 (Or. Ct. App. 2008).

Moe v. Eugene Zurbrugg Constr. Co., 123 P.3d 338, 345 (Or. Ct. App. 2005) (no error to decline instruction if it "is not correct in all respects").

Roop v. Parker Northwest Paving Co., 94 P.3d 885, 903-04 (Or. Ct. App. 2004).

Leiseth v. Fred Meyer, 57 P.3d 914, 916 (Or. Ct. App. 2002) ("failure to give a requested instruction is not error unless the instruction is correct in all resepects") (citation omitted).

Baker v. Infratech Corp., 26 P.3d 835 (Or. Ct. App. 2001).

Summers v. Binns, 10 P.3d 294, 297 (Or. Ct. App. 2000).

Burke v. American Networks, Inc., 768 P.2d 924 (Or. Ct. App. 1989).